No. 84-778 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 14, 1984
CERTIORARI GRANTED JANUARY 14, 1985

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CHRONOLOGY

Date	Proceeding
May 6, 1981 Approximately 7:20 p.m.	Arrest.
May 6, 1981 By 10:15 p.m.	Charged in District Court. Released on own recognizance.
May 12, 1981	Preliminary inquiry - jury trial prayed - case transferred to Circuit Court.

August 7, 1981	Respondent's Motion to Suppress.
August 7, 1981	Respondent's Motion to Dismiss.
August 18, 1981	Respondent's Memorandum in Support of Motions to Suppress and Dismiss.
August 28, 1981	State's Opposition to Motions to Suppress and Dismiss.
September 1, 2, 15, 1981	Hearings on Motions to Suppress and Dismiss.
September 15, 1981	Denial of Motions.
September 16, 1981	Hearing on and denial of Motion to Reconsider Ruling on Motions.
September 16, 17, 18, 21, 1981	Trial.
January 25, 1983	Sentencing.
February 7, 1983	Order for Appeal.
March 7, 1984	Opinion of the Court of Special Appeals.
April 2, 1984	State's Motion for Reconsideration and Stay of Mandate.
May 3, 1984	Motion denied.
May 4, 1984	Mandate issued.

May 21, 1984	State's Petition for Writ of Certiorari filed in Court of Appeals.
September 14, 1984	Petition denied.
November 14, 1984	State's Petition for Writ of Certiorari filed in United States Supreme Court.
January 14, 1985	Certiorari granted.

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

PLEADINGS

(Title Omitted)

MOTION TO SUPPRESS EVIDENCE

(Filed August 7, 1981)

The Defendant, through undersigned counsel, moves this Court to suppress any and all evidence to be used at this trial on the following grounds:

1. That the evidence secured is not in violation of Article 27, Section 418, et seq.

2. That the distribution alleged in the Statement of Charges was a permissive distribution under Article 27, Section 418 et seq., and was not criminal in nature and the evidence secured and intended to be used at this trial is not proper evidence to be used against the Defendant, for to do so, would deny him due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. That the evidence was unlawfully obtained.

4. Further grounds for the suppression of the evidence will be developed at the time of the hearing of this Motion.

WHEREFORE, the Defendant respectfully requests that this Court suppress any and all evidence to be used in the trial of this matter.

(Signatures and Certificate of Service omitted).

(Title Omitted)

MOTION TO DISMISS

(Filed August 7, 1981)

The Defendant, through undersigned counsel, moves the Court for an order dismissing the case against the Defendant and as grounds for said Motion states the following:

I.

The State's Attorney for Prince George's County, pursuant to a Statement of Charges, has instituted a criminal proceeding charging the Defendant with violation of Article 27, Section 418.

1. The Statement of Charges is vague and insufficient as a matter of law in that it fails to set forth with sufficient specificity the charges of which the Defendant stands accused.

2. The statutory provisions of Article 27, Section 418, under which the State is proceeding, is, as written, repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the

United States because:

(a) Said statutory provisions are void for vagueness in that the same forbid or require the doing of an act in terms so vague, fluid and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof, and as such, are repugnant to the due process provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States; and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecesarily broadly and therby invade the area of protected freedoms in that the statute sets forth no standards for determining and regulating obscenity and thus are insufficient for those minimum standards proscribed by the United States Supreme Court in connection with speech and communications, presumptively protected under the First Amendment and Fourteenth Amendment; and further,

(c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of First Amendment freedoms, because the said provisions are susceptible of sweeping and improper application by law enforcement officials and have a "chilling and inhibiting effect" on the exercise of the Federal Constitutional rights of citizens of the State of Maryland and the United States, as well as the Defendant, in the area of the First Amendment; and further,

(d) Said statutory provisions are repugnant to the substantive due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution because they permit deprivation of liberty and/or property rights and interests for the exercise of First Amendment rights by unreasonable, arbitrary and capricious means by law enforcement officials of the State of Maryland without a showing of a real and substantial relationship to any state's relationship to any state's subordinating interest which

is compelling to justify state action limiting First Amendment freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural due process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States by employing means lacking adequate safeguards which the due process demands to assure protected matter the constitutional protection of the First Amendment to which it is entitled.

The statutory provisions of Article 27, Section 418 are clearly repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States as said provisions have been applied, construed and are being applied and construed by the State's Attorney and/or law enforcement officials in the following respects:

(a) That in the application of said statute, the said law enforcement officials did not have available the necessary probable cause necessary for the

issuance of the Statement of Charges.

3. That the Defendant was arrested falsely and without probable cause as the charging document does not set forth facts sufficient to establish criminal activity on the part of the Defendant.

4. That Article 27, Section 418 is void for vagueness and overbreadth.

II.

It is, therefore, respectfully submitted that the prosecution in the case at bar is brought in bad faith for the purpose of harassment and that the statute under which the State is proceeding, is void for vagueness, overbreadth and is [u]nconstitutional on its face and is being unconstitutionally applied to the Defendant.

WHEREFORE, the Defendant prays that the case be dismissed.

(Signatures and Certificate of Service omitted).

(Title Omitted)

CONSOLIDATED MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS AND MOTIONS TO SUPPRESS

(Filed August 18, 1981)

Defendants' attorney herein respectfully submits to this Honorable Court this Consolidated Memorandum in Support of Motions to Dismiss and Motions to Suppress heretofore filed with this Honorable Court.

* * * *

(factual allegations about other defendants omitted)

On or about May 6, 1981 at approximately 8:00 a.m. Detective Ray Evans, #884, entered the Silver News Bookstore and selected two magazines for purchase. Detective Evans then handed Defendant Baxter Jillispi Macon, employed therein, a $50 bill as purchase money for the magazines. Detective Evans took the magazines and an unspecified amount of money as change from the alleged purchase and left the store.

Five minutes after this purchase, Detective

Evans and two unnamed police officers, all employed by Prince George's County, Maryland and acting under color of state law, entered the Silver News Bookstore.

Officers demanded that the customers therein present identification and then expelled customers from the store.

Officers then demanded that Defendant Macon return and took a $50 bill allegedly used to purchase the two magazines, retaining monies delivered by Defendant Macon to Detective Evans as change from the alleged magazine purchase.

Officers ordered Defendant Macon to close the store, handcuffed Defendant Macon, and demanded that he accompany the officers. Defendant Macon was taken to the Bowie police station where he was photographed and finger printed. Additionally, Defendant was taken to a hallway in the police station where he was separately photographed by an unnamed police officer with a small instamatic camera.

Afterward, Defendant Macon was interrogated

by a vice squad officer who read from the list of questions pertaining to Defendant's place of employment. Defendant was never advised of his rights.

Defendant was then taken to the Upper Marlboro police station where he appeared before a bail commissioner who released Plaintiff on his own recognizance.

* * * *

(factual allegations about other defendants omitted)

I.

CHARGES FOR SALE OF OBSCENITY MUST BE DISMISSED WHERE MAGISTRATE DID NOT VIEW MATERIAL ALLEGED TO BE OBSCENE BEFORE CHARGING DEFENDANTS.

In Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789 (1973) a judge of the New York Criminal Court signed a search warrant for the seizure of film and three "John Doe" warrants for the arrest of the theater manager, the projectionist and the ticket taker, respectively, for violating obscenity laws of the

State of New York, as codified in New York Penal Law §235.05, McKinney's Consol. Laws, c.40.

Before signing the arrest and search warrants, the judge viewed the film, supra at 485. However, the judge did not hold a prior adversary hearing on the question of the film's obscenity before signing the orders. Id. The Supreme Court explicitly held that a "prior adversary hearing would not be necessary in all cases where allegedly obscene material is seized [or people are arrested for violating obscenity laws." Supra, at 489.

However, the Court did not go so far as to hold that a judge could issue a probable cause warrant without at least viewing the allegedly obscene material. Citing Lee Art Theater v. Virginia, 392 U.S. 636, 637, 88 S.Ct. 2103, 2104 (1968), the Court acknowledged that the question of whether a judge must "[view] the motion picture before issuing a probable cause warrant . . . " was "open". Supra at 488. Indeed, in a footnote to this point, the Court

stated that "[i]t is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there." Supra at 488 n.4, clearly suggesting that a "neutral and detached magistrate" must dutifully make "an independent judicial determination" of printed matter's probable obscenity "prior to issuing the warrant." Supra at 489, Marcus v. Search Warrants, 367 U.S. 717, 731-733 (1961).

Other cases interpreting the holding of Heller have likewise held that no prior adversarial hearing was absolutely necessary in all obscenity cases involving search or arrest warrants. State v. Combs, 536 P.2d 1301 (1974), Hudahl v. State, 536 P.2d 1293 (1975). People v. Peters, 368 N.Y.S.2d 753 (1975).

However, most, if not all of the same courts, have mandated that a magistrate "[receive] evidence and [view] sample copies of the allegedly obscene material" prior to the issuance of any warrant. State v. Combs, 536 P.2d at 1303. Other courts, confronted

with warrants issued after a magistrate viewed the objectionable material, have been careful to state only that no "prior adversarial hearing" was required, implicitly approving of the careful judicial scrutiny given the materials for a probable cause determination of obscenity prior to the issuance of warrants. Hudahl v. State, 536 P.2d at 1295.

One court explicitly held that no prior judicial scrutiny was necessary prior to the indictment and arrest of a defendant for alleged violations of obscenity laws, provided the allegedly obscene materials were brought before a grand jury and the defendants were indicted there prior to their arrest. People v. Peters, 368 N.Y.S.2d at 758. In a footno[t]e, the court added that "the grand jury proceeding afforded the defendant at least the equivalent of the safeguards of an 'ex parte' probable cause hearing before magistrate in focusing searchingly on the question of obscenity." Supra at 758 n.2.

Thus, all courts interpreting the Supreme Court

holding in Heller, have agreed that some type of judicial or impartial scrutiny of allegedly obscene materials for a probable cause determination of obscenity by someone other than a law enforcement officer was necessary prior to the issuance of arrest warrants for those distributing the allegedly obscene materials in question.

> "The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without assertions of the police officer without any inquiry by the justice of the peace into the factual basis of the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity', Marcus v. Search Warrants, 367 U.S. at 732 (1961) and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See Freedman v. Maryland, 380 U.S. 51, 58-59 (1964)."

Heller v. New York, 413 U.S. at 488 n.4.

In conclusion, any arrest and criminal prosecution of any herein named defendant not founded upon an arrest warrant secured through a

probable cause determination of the questioned material's obscenity by an impartial judicial magistrate who refused to rely on the "conclusory assertions of the police officer" seeking the arrest must be dismissed as effecting an illegal and unconstitutional "prior restraint" on the defendant's right to freedom of expression. Supra at 488.

II.

CHARGES FOR SALE OF OBSCENITY AMOUNTING TO A CAMPAIGN AGAINST SELLERS OF "ADULT" PRINTED MATERIAL EFFECT A PRIOR RESTRAINT OF DEFENDANTS' FIRST AMENDMENT RIGHTS, AND MUST BE DISMISSED.

In United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971), the Supreme Court held that "because only a judicial determination in an adversary proceeding ensures the necessary freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 402 U.S. at 367, see; Freedman v. Maryland, 380 U.S. 51 (1965), Heller v. New York, 413 U.S. 483, 489 (1973).

Where purchase-arrest procedures are employed as part of a campaign to close down stores selling alleged pornography or severly curtail the amount of alleged pornography sold in those stores, a prior or final restraint of the type envisioned in United States v. Thirty-Seven Photographs has been effected. Unsanctioned by any order emitting from an adversary hearing prior to the arrests of the defendants and the effecting of this prior restraint on the right to free expression, charges brought against the defendants which have effected this prior restraint must be dismissed.

In Penthouse International, Ltd. v. McAuliffe, 436 F.Supp. 1241 (1977), cert. dismissed 447 U.S. 931 (1981), defendants in a state obscenity action against them complained to a federal court of "repeated arrests, repreated visits to retailers and threatening comments in the press [that erected] a system of prior restraint which was as insidious and effective as if the subject publications had been seized by authorities for

the purpose of destruction." Supra. at 1244. Specifically, local enforcement officers made six warrantless arrests and one warranted arrest of defendants for allegedly selling obscene materials. No magazines were confiscated. Significantly, the court highlighted the purchase-arrest scenario with statements appartently made by Solicitor McAuliffe to local newspapers. Mr. McAuliffe was quoted as saying he would "get whoever sold obscene magazines and the[y] [would] go to jail." Mr. McAuliffe was also quoted as saying that his obscenity campaign was "working because officers checking for obscene magazines haven't found anything in violation of the laws. . ." after the campaign was initiated.

In deciding that a "prior restraint" had been illegally imposed upon the defendants, the court succintly [sic] stated that "numerous and harassing arrests with or without a warrant prior to a final adjudication upon the issue of obscenity vel non at an adversary hearing constitutes a prior restraint

violative of the First and Fourteenth Amendments to the United States Constitution." Supra at 1256. The court did not go so far as to require an adversary hearing before any arrests were made. Supra. at 1255. However, in the context of repeated arrests and threatening statements resulting in a "prior restraint", an adversary hearing on the issue of obscenity prior to the campaign of arrests was necessary. Supra at 1256.

In the case at bar, there have been, not six, but over forty arrests. Exhibit 3. There have been numerous statements to the local press revealing an intent on the part of the law enforcement officers to close down the adult bookstores of Prince George's County. Exhibits 2, 4. Finally, there have been bookstore closings made pursuant to the arrests and the harassing of customers in the store. Statement of Facts. All of these acts have not only effected unwarranted harassment upon distributors of goods that are presumptively protected under the First Amendment to the United States Constitution, Cinema

Classics Limited v. Burch, 339 F.Supp. 43 (C.D. Cal. 1972) aff'd 409 U.S. 807, but have infringed upon the right of public access to information. Firestone v. Time, Inc., 460 F.2d 712 (5th Cir. 1972), cert denied 409 U.S. 875, Blount v. Rizzi, 400 U.S. 410 (1971).

As in McAuliffe, the state enforcement action, effecting a prior restraint, as embodied in the bringing of criminal charges against the defendants herein, must be permanently suspended by a dismissal of these charges.

III.

EVIDENCE TAKEN UNDER FALSE PRETENSE OF PURCHASE IS ILLEGALLY AND CRIMINALLY SEIZED AND CANNOT BE INTRODUCED AS EVIDENCE AGAINST DEFENDANTS WHERE EITHER STOLEN OR SEIZED IN VIOLATION OF DEFENDANTS' FIFTH AMENDMENT RIGHTS.

In nearly every purchase-arrest case, police officers have confiscated the purchase money from the defendants after placing them under arrest. It is evident from these facts that police officers never intended to let the defendants keep the money in

exchange for the magazines or films allegedly purchased, but rather intended to deceive the defendants into surrendering the magazines or films from their possession in exchange for money which the officers intended to retrieve. The officers, thus, came into possession of these magazines or films by misrepresenting an exchange of money for goods.

The crime of false pretenses, now merged into the crime of theft, Md. Annotated Code Art. 27, §341, is a false representation of an existing fact made with the intent to defraud, such representation operating as a deception inducing the transfer of money or other thing of value, and the taking of such money or valuable thing by the person committing the fraud to the loss of another. Willis v. State, 205 Md. 118, 106 A.2d 85 (1954). Maryland Law Encyclopedia, §1. Full ownership of the property by the person from whom it is taken is not necessary to sustain a charge of false pretenses. Deibert v. State, 150 Md. 687, 133 A. 847 (1926).

The State now seeks to have this evidence, taken criminally, introduced against the defendants as the basis for prosecution for the sale of alleged obscenity. This court cannot sanction the introduction of evidence, taken illegally, against defendants in a criminal trial.

At best, this evidence has been illegally seized from the defendants without any warrant or court sanction. Thus, the defendants have been compelled to surrender evidence, without a hearing. That will result in their prosecution.

The Fifth Amendment generally protects individuals from coercion to prove a charge against themselves "out of [their] own mouth." Malloy v. Hogan, 378 U.S. 1, 8 (1963).

The Fifth Amendment applies to the production of documents, as well as to testimony.

> "[U]nreasonable searches and seizures condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and

> compelling a man in a criminal case to be a witness against himself which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure. . ." And we have been unable to perceive that the seizure of a man's private books and papers to be used against him is substantially different from compelling him to be a witness against himself." Boyd v. United States, 116 U.S. 616, 663.

While a corporation has no Fifth Amendment rights, Oklahoma Press Publishing Co. v. Wallings, 329 U.S. 186 (1946), the state cannot require the production by a person of private books and records that would incriminate him. U.S. v. Dionisio, 410 U.S. 1, 12 (1972).

Wherefore, Defendants should be allowed to assert Fifth Amendment rights not to present books or records that would incriminate Defendants. Likewise, Defendants cannot be compelled to produce books or records that would lead to prosecution or lead to other evidence used in prosecution of Defendants. Kastigar v. U.S., 406 U.S. 441, 453 (1972).

(Signatures, Certificate of Service and newspaper

article exhibits omitted).

(Title Omitted)

STATE'S OPPOSITION TO MOTION TO SUPPRESS AND MOTION TO DISMISS

(Filed August 28, 1981)

Comes now the State of Maryland, by and through Arthur A. Marshall, Jr., State's Attorney for Prince George's County, and requests this Honorable Court to deny the defendant's Motion to Dismiss and Motion to Suppress Evidence, and for reasons states as follows:

I.

CHARGING DOCUMENT MAY NOT BE DISMISSED UPON A FINDING OF LESS THAN PROBABLE CAUSE IN APPLICATION FOR STATEMENT OF CHARGES.

The State submits that more than sufficient probable cause can be found as to each application for statement of charges. However, the issue which the

defendants raise (i.e., lack of probable cause) would not, even if established, mandate or permit this Honorable Court to dismiss the charging documents before it.

In Schaefer v. State, 31 Md. App. 437 (1978), the issue before the Court of Special Appeals was whether a defendant's motion to dismiss a charging document should have been granted because the sworn application for charges allegedly contained facts insufficient to create probable cause. The Court, after finding that sufficient probable cause in fact existed, went on to stress in footnote 5, that:

> "We do not imply by our holding that such a motion would have been proper had probable cause not been established. We do not raise [sic, reach] the question whether a defendant may be tried upon an arrest warrant or summons issued on less than probable cause shown in the application. Neither statute nor rule of this jurisdiction prohibits the trial of the defendant under an arrest warrant, or summons to a defendant, which is issued without probable cause."

Thus, the Court in Shaefer, made it abundantly clear that a negative inference was not being

established by the Court not first ruling on the issue of whether a charging document may or may not be dismissed where the application does not establish probable cause. Indeed, the Court makes it clear that such a dismissal more than likely would be impermissable as no statute or rule justifies such action.

II.

COMMISSIONER MAY DETERMINE PROBABLE CAUSE WITH OR WITHOUT PERSONAL VIEWING OF MATERIAL ALLEGED OBSCENE.

In each of the cases before this Court, the applications for statements of charges contain more than simple conclusory assertions, but also explicit descriptions of the obscene material in question. It is well settled in the law that probable cause may be established and a warrant properly issued where the affiant has personal or even hearsay knowledge of the facts which he has sworn to be true to the best of his knowledge and belief, see: Shaefer, supra p. 444. The Court in Shaefer went on to further address the issue

of probable cause as follows:

> "The quantum of required probable cause is the same to justify the issuance of a search and seizure warrant or an arrest warrant or a summons to a defendant. See Aguilar v. Texas, 378 U.S. 108, 112, n.3 (1964) . . . Dawson v. State, 11 Md. App. 694, 697, n.1 (1971), cert. den., 263 Md. 711 and 712 (1971). The Court of Appeals said in Edwardsen v. State, 243 Md. 131, 136 (1966): 'The rule of probable cause is a non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which could arouse mere suspicion.' . . . Probable cause is less than certainty or demonstration but more than suspicion or possibility. It is to be determined by the judicial officer to whom application for the summons or warrant is made. If a prudent and cautious man would be justified from the facts presented in believing that the offense has been committed and the accused committed it, the summons or warrant may be properly issued . . .The sworn facts should be interpreted in a common-sense rather than a hyper-technical manner. Probable cause, however, may not be made out by statements which are purely conclusory, stating only the affiant's or an informant's belief that probable cause exists," Shaefer, supra. 443-444.

The function of a commissioner does not change where he is requested to issue a charging document for a violation of obscenity laws, specifically here, Art. 27

Sec. 418. As an arm of the Judicial branch of government, District Court Commissioners are obliged to: "conduct investigations and inquiries into the circumstances of any matter presented to him in order to determine if probable cause exists for the issuance of a charging document, warrant or criminal summons." C.T. 2-607. The question and method for determining probable cause does not change or alter where obscene matter is involved.

III.

ACTION BY POLICE OFFICERS DID NOT OPERATE AS A PRIOR RESTRAINT OF EXPRESSION.

In each case before this Court there was a determination made by an independent, neutral and detached magistrate, that probable cause existed to charge the defendants with crimes of distributing obscene matter. In fact, in all but four cases before the Court, the defendants were not arrested prior to the issuance of an arrest warrant. This form of judicial review removes the doubt of any possible prior

restraint of first amendment rights by law enforcement officials. Moreover, the United States Supreme Court, in Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789 (1973) and later in New York Feed Co. v. Leary, 305 F.Supp. 288 (S.D.N.Y. 1969) has held that an adversary hearing on the issue of obscenity prior to an arrest is not required.

IV.

NO EVIDENCE WAS SEIZED BY POLICE OFFICERS IN VIOLATION OF DEFENDANTS RIGHTS.

Defendants allege that police officers who purchased alleged obscene material, and who then reviewed this material in its entirety, and who then effected the arrest of a defendant, based upon the probable cause shown in each application for charges, have committed the crime of theft (Art. 27 Sec. 342). To propose that police officers who engage in the collection of evidence of a crime are thieves is to say the State has no right to obtain evidence of a crime. Such a notion defies the basic foundations of our

criminal laws and the right and duty of the State to enforce them.

The defendants further argue that the purchase of obscene material by police officers amounted to compelling testimony from the defendants, in violation of their Fifth Amendment rights.

There is no basis in fact or law to show that a purchase of obscene matter and retrieving the monies used therefore, in any way amounts to the compulsion of testimony from a defendant. In fact, evidence such as is before the Court could not, under any circumstances amount to "private books and papers," and thus become testimonial, such as described in Boyd v. United States, 116 U.S. 616 (1886) and relied upon by the defendants as authority.

WHEREFORE, the State prays this Honorable Court to deny the defendant's Motion to Dismiss the Charging Documents and Suppress Evidence.

(Signature and Certificate of Service omitted).

TRANSCRIPTS

TESTIMONY AT MOTIONS HEARING

September 2, 1981 - M2. 8 - 15

R.B. SWEITZER, JR.,

a witness produced on call of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SANDLER:

Q. Officer Sweitzer, you are a member of the Prince George's County Police Department?

A. Yes, sir.

Q. In what capacity are you a member?

A. Detective with the Vice-Criminal Intelligence Section.

Q. On May 6, 1981, were you affiliated with the Prince George's County Police Department?

A. Yes, sir.

Q. In what capacity?

A. I was a detective in the Vice-Criminal Intelligence Section.

Q. Did you have an opportunity on May 6, 1981, to be in a bookstore known as Silver News, Inc., 2488 Chillum Road, Hyattsville?

A. Yes, sir.

Q. Can you tell the Court if you can recall approximately what time you were in that bookstore and the reason for your being there?

A. I was in the bookstore approximately 7:20 p.m. and I went in to arrest Mr. Macon.

Q. At 7:20 p.m. you went in to arrest a Mr. Macon?

A. Yes, sir, a clerk in the store. I ascertained his name after arrest.

Q. You ascertained his name after the arrest?

A. Yes, sir.

Q. He was the clerk. Now, could you tell the

Court why you went into the store at 7:20 p.m. to arrest the clerk?

A. Officer Evans is the officer who made a purchase of two magazines and brought the magazines to me. I was waiting outside. I reviewed the magazines and at that time entered the store and placed the clerk under arrest for the distribution of obscene material.

Q. At the time that Officer Evans purchased the magazines, you were not in the store?

A. No, sir.

Q. When he brought the two magazines that he purchased to you, what condition were they in?

A. I am not sure.

Q. If I were to tell you that they were sealed in plastic, would that —

A. It would be very possible.

Q. Do you recall having to open the plastic in order to look at the magazines?

A. No, sir, I don't. I don't recall having

opened the plastic.

Q. Do you have some recollection that they were in plastic?

A. I have no doubt specifically, but magazines of that type are usually in plastic.

Q. Would it be fair to assume these magazines were in plastic?

A. It would be fair to assume, yes, sir.

Q. Tell me what you did as far as perusing the magazine or the magazines?

A. I reviewed the magazines cover to cover, made a determination that the photographs within met the criteria we had used in the previous warrants and arrests and entered the store and placed the clerk under the arrest.

Q. You made a determination that the photographs met the criteria that you had used in previous arrests in previous warrants, is that your testimony?

A. Yes, sir.

Q. And then, on the basis of that you went in and arrested Mr. Macon for, as you indicate, distributing obscene material?

A. Yes, sir.

Q. When did this distribution take place?

A. When Officer Evans purchased the magazine.

Q. Were you there when it was purchased?

A. No, sir.

Q. Do you know whether or not at the time it was purchased anyone had made a determination that that magazine or those magazines were obscene?

A. I don't quite understand your question.

Q. Do you know whether or not at the time Officer Evans purchased the two magazines that he selected anyone had made a determination that those two magazines were obscene or probably obscene?

A. No, sir, I guess it would have been up to Officer Evans.

Q. So, based on your knowledge you know of

no determination as to the obscenity of those two magazines?

A. At that time, no sir.

Q. Prior to your determination?

A. No, sir.

Q. When you went into that store, had you been in there before?

A. Yes, sir.

Q. Would it be fair to say that you were familiar with the surroundings of the store and the material that was in there and probably the employees that were in there?

A. Yes, sir.

Q. This clerk that you referred to, where is he positioned in the store?

A. On a raised counter.

Q. Is he behind a cash register?

A. Yes, sir.

Q. If you recall, Detective Sweitzer, at that cash register, is there a large sign?

A. There are several signs in that area.

Q. Do you recall what those signs indicate?

A. No, sir.

Q. If I were to tell you that there is a sign at the cash register that states the following "That the customer agrees that the material selected by him or her is being purchased for scientific, educational, governmental or other similar justification, would you say that that sign was there?

MR. WHISSEL: Object.

THE COURT: I will sustain the objection. He just wouldn't know. Since he doesn't know whether the sign is there or not, I don't think he can agree as to what it says.

I will sustain the objection.

BY MR. SANDLER:

Q. Do you recall testifying at a deposition in connection with a federal suit in connection with that same question?

A. About the sign?

Q. Yes.

A. No, sir.

Q. Do you recall my taking your deposition with that same question?

A. I recall the deposition.

Q. Do you recall stating the sign was there?

A. No, sir.

Q. You don't recall that?

A. No, sir.

Q. How many times have you been in that store?

A. Approximately five, six.

Q. Tell me what signs you have seen there?

A. I don't recall. Most of the signs I assumed were in reference to material, advertisements and so forth. I didn't pay any attention to them.

Q. Do you recall signs throughout the store indicating the material available in the store is available only for scientific, educational —

MR. WHISSEL: Objection.

THE COURT: He can ask it again.

BY MR. SANDLER:

Q. Do you recall whether or not there were signs throughout the store indicating that the material available in the store is available only for scientific, educational, governmental or other similar justifications?

A. No, sir.

Q. You have no knowledge of that?

A. No, sir, I do not.

Q. And you are familiar with the surroundings of where the cash register is?

A. Yes, I am.

Q. Who instructed you to make the determination whether or not the magazine was obscene?

MR. WHISSEL: Object.

THE COURT: Overruled.

MR. WHISSEL: I think it is assuming a fact not in evidence.

THE COURT: True, but it is still just a motion and I am going to let it in. He can answer. Go ahead.

THE WITNESS: I was given my instructions by Sergeant MacDonald.

BY MR. SANDLER:

Q. He is the individual that instructed you to make the determination of obscenity?

A. Yes, sir.

MR. SANDLER: May we go off the record? May we approach the bench?

THE COURT: Yes.

(Bench conference off the record.)

MR. SANDLER: Your Honor, we have no further questions of this witness.

THE COURT: Do you have any questions, Mr. State's Attorney?

MR. WHISSEL: No, Your Honor.

THE COURT: Thank you very much. You are going to be called back in other cases. I would

appreciate it if you don't discuss your testimony with anyone or allow anyone to discuss it with you.

* * * *

September 15, 1981 - M3. 71 - 76

[TO DETECTIVE SWEITZER, JR.]

MR. SANDLER: I would like to go back to the case of Baxter Macon which is C.A. 81-396. This is Case No. 81-396, Officer, and involves May 6, 1981.

FURTHER DIRECT EXAMINATION

BY MR. SANDLER:

Q. This involves May 6, 1981?

A. Yes, sir.

Q. And that involves the defendant Baxter Macon. Are you familiar with the arrest that was made on May 6, 1981 involving Baxter Macon?

A. Yes, sir.

Q. Were you in fact the arresting officer?

A. Yes, I was.

Q. You are not the officer that made the

selection or the purchase or the material, are you?

A. No. sir.

Q. Is Detective Evans actually the one who selected the material and purchased it?

A. Yes, sir.

Q. Was he following your instructions?

A. Yes, sir.

Q. Did you tell him to look for material that depicted explicit sexual conduct and that's the material that you felt the Court would deem obscene? After he had obviously purchased or selected a magazine and I believe it was a magazine, several magazines, is that correct?

A. Yes, sir.

Q. There were no films involved?

A. No, sir.

Q. He brought those magazines out to you?

A. Yes, sir.

Q. You examined the magazines?

A. Yes, sir.

Q. You made a determination that in your opinion they were obscene?

A. Yes, sir.

Q. As a result of that determination, did you prepare an examination [sic, statement] of charges?

A. Yes, sir.

Q. Did you have a statement of charges with you?

A. Yes, sir.

Q. Did you go in and arrest the defendant?

A. Yes, sir.

Q. Did you arrest him based on your information that the material Detective Evans bought was obscene?

A. Yes, sir.

Q. Prior to the time that Detective Evans had purchased and selected the material, do you know of anyone that made a determination that that material was obscene?

A. No, sir.

Q. That statement of charges was made on your personal opinion, on the basis of what Sergeant MacDonald instructed you?

A. Yes, sir.

Q. In that case, did you give him any pre-recorded money?

A. Yes, a 50 dollar bill.

Q. Did you take the 50 dollar bill back?

A. Yes, sir, I did.

Q. Did you give him back the change that was given to Detective Evans?

A. No, sir.

Q. Do you still have the 50 dollar bill?

A. Not the 50 dollar bill, no, sir.

Q. Do you still have the change?

A. Yes, sir.

Q. Who has the 50 dollar bill?

A. It is back in the police funds.

Q. Do you still have the magazine?

A. Yes, sir.

Q. The idea to buy or look for obscene material or material that the Courts would deem obscene was obviously originated with Sergeant MacDonald, is that a fair statement?

A. I don't get my instructions from him.

MR. SANDLER: No further questions.

MR. WHISSEL: Court's indulgence.

MR. SANDLER: One question.

BY MR. SANDLER:

Q. At the time you made the arrest of Baxter Macon, did you place him in handcuffs?

A. Yes, sir.

MR. SANDLER: No further questions.

CROSS-EXAMINATION

BY MR. WHISSEL:

Q. Detective Sweitzer, the arrest of Mr. Macon took place after the magazine or the items of evidence were purchased by Detective Evans, is that correct?

A. Yes, sir.

Q. And any monies that were retrieved were retrieved after you observed or looked at the items of evidence that Detective Evans had purchased, is that correct?

A. Yes, sir.

MR. WHISSEL: That's all I have.

THE COURT: Any further questions?

MR. SANDLER: Your Honor, in this case Detective Evans I think we have established did actually make a purchase. But we have been informed by the deputy that he can't serve him with a subpeona because he is in an undercover capacity. We have attempted to bring him before the Court and unless we have some help from the prosecutor, we are not going to be able to do so. I don't know there was going to be any objection to us having established the sale.

MR. WHISSEL: He is under summons from the State and I assume we have equal powers of the Court to reach him.

THE COURT: Do we need to reach

Detective Evans?

MR. WHISSEL: I don't know. Only Mr. Sandler can answer.

MR. SANDLER: My question was, are you going to require us to establish by any other person the sale? If so, I am going to ask that we continue this matter and instruct the sheriff that he must, based on what I have been told this morning, that they can serve the police station. We were called at our office and he said he could not serve the subpoena.

THE COURT: What is the State's position? Will you stipulate —

MR. SANDLER: Based on Detective Evans' instructions and the fact that he purchased it with a marked bill and it was recovered.

MR. WHISSEL: To precisely that I will stipulate it.

MR. SANDLER: We don't need Detective Evans.

We have no further questions or any

further cases for Detective Sweitzer.

THE COURT: Thank you.

(Witness excused).

* * * *

COURT'S RULING

September 15, 1981 - M3. 127 - 133

THE COURT: We are dealing with, I believe, a total of seven cases that we have broken out of the total group of cases and are dealing with these cases because of availability of witnesses at the time the motions were heard. I am going to deal with the facts as a group rather than going over each and every case individually because all of the facts are very similar.

We have in the community apparently complaints that have arisen from neighborhoods, from various groups and organizations to the police, which brings about an undercover operation as to various bookstores in Prince George's County known as adult

bookstores.

Undercover police officers go into the bookstores after a pre-determined method of operation, discussion among themselves and with the State's Attorneys and decide to purchase what they determine to be from the material itself obscene material. They then review the material and do one of two things. They go back and make an arrest in three or four of these cases without a warrant, or at least in one case here, they go before a commissioner and get an arrest warrant, a statement of charges and effectuate the arrest.

It's been argued by the defense that the charging documents ought to be dismissed and if they are themselves not dismissed, then the evidence ought to be suppressed at the time of trial. I will deal first with the motion to dismiss and what we consider to be one of the more important, if not the most important issue in the motion to dismiss, and that is prior judicial determination.

The cases that the defendants have cited in their well-reasoned and well-thought-out arguments and presentations are Roaden versus Kentucky, Marcus versus Search Warrants, A Quantity of Books versus Kansas. These are all cases in which the decisions have condemned mass or broadly effective seizures of allegedly obscene material without a prior adversary hearing. The Supreme Court has repeatedly held that confiscatory seizure of substantial quantities of books or other matters are not permissible unless preceded by an adversarial judicial determination of the obscenity of the material. The rationale is clear. The rationale is to safeguard against governmental suppression of non-obscene expression which is protected by the First Amendment.

What this comes down to is, you can't seize an effective prior restraint without a prior adversary hearing. This is well and good. But this law and these cases, this Court finds are totally inapplicable to the cases that are before us. I do not

find that we have a seizure under the Fourth Amendment. I find the Fourth Amendment inapplicable and therefore will not address the question of standing since that is moot based upon my decision of inapplicability of the Fourth Amendment, nor do I find we have an issue of prior restraint. The materials in our cases were bought by the police officers, not seized.

The issue is whether a prior judicial determination is required as I see it, before an arrest for an obscenity violation can be made.

In Adler versus Pomerlau at 313 F.Supp. 277, a 1970 case, a three-judge District Court panel in Maryland, Judge Northrup writing the opinion held that an adversary hearing on the issue of obscenity is not required prior to arrest, Judge Northrup in writing for the Court felt strongly that the requirement of an adversary hearing prior to seizure in combination with the traditional safeguards inherent in a criminal prosecution will adequately protect First Amendment

rights. However, a prior judicial determination before arrest in other jurisdictions has found some support.

In Delta Book Distributors, Inc. versus Cronvich, 304 F.Supp. 662, in Sokolic versus Ryan, 304 F.Supp. 213, in Cambist Films, these cases held that a prior judicial determination prior to arrest was preferred but Adler rejected this approach as not well reasoned.

Adler, of course, is a case of the Maryland Federal Courts. A New York Federal Court has also rejected the prior determination before arrest and has followed the same approach as Adler in Milky Way Productions versus Leary, 305 F.Supp. 288. The Milky Way Court held that there need not be an adversary hearing before an arrest for obscenity. There are a few cases which address the issue of prior determination before arrest. Most of the cases address the issue of adversary hearing for a prior determination before a seizure. Milky Way and Adler are the most persuasive along with Paperback Mart

versus City of Anniston, Alabama, 407 F.Supp. 376 and Rage Books versus Leary, 301 F.Supp. 546.

There is an amazingly similar case in New York, People versus Kokich, 338 N.Y.S. 2d 463 decided at the trial level which held, no prior adversary hearing or judicial scrutiny was required before the arrest of the defendant on obscenity. In that case, in purchasing the material, the police officers did in some of these cases obtain an arrest warrant. The Kokich case held all that was necessary was the purchase of the books and arrest warrants and return to effectuate the arrest.

Based upon the law and what I consider to be the controlling law of Adler and Milky Way, I deny the motion for dismissal for want of prior determination.

I would now like to deal with the constitutionality issue that has been raised in the motion to dismiss, constitutionality of Section 418 of Article 27.

The Maryland obscenity statute has been on the Maryland books for 14 years, basically in the same format. It was first enacted as written in 1967 and has never been struck, though this in itself does not mean that it is constitutional. In other words, all that means is that the State statute must be construed within the law the finding of obscene as set forth in Miller and are as is. The statute has always been read against the backdrop of the Miller obscenity test.

There is no logical reason for finding the statute is unconstitutional. Nor do I find that the application based upon the facts that I have found to be unconstitutional.

Dealing now with the exemption section of 423, the Court of Special Appeals has set us guidelines to follow in State versus Gravette, on the applicablity of Section 423. The Court states in those guidelines that 423 should be considered after a trial on the merits and on the submission of a motion for judgment of acquittal. Therefore, we do not consider it to be an

applicable consideration on the motion to dismiss or on the motion to suppress.

Probable cause in the arrest warrant has been of some concern. The State has brought to the Court's attention the case of Schaefer versus State, 31 Md. App. 437, in which the Court of Special Appeals held a written application for their warrant by law enforcement officials having personal knowledge was sufficient to establish distribution to justify a prudent and cautious man in believing that a crime that was alleged was actually committed. The Court went on to explain that an arrest warrant is to be issued only if it appears to the commissioner upon oath that there is probable cause to believe a crime has been committed and the accused has committed the crime. Probable cause is less than a certainty and more than a mere suspicion. I say this even though there is a conflict and a dispute as to who prepared the statement of charges. It could well have been that the police officers in this case did prepare the statement of

charges and the commissioners were incorrect. But regardless of who prepared them, the commissioners have the final obligation of reviewing them to determine that that was the charge.

I do not find it critical that someone else would have prepared it if the commissioner signed it, having the ultimately responsibility for charging the defendants. The facts contained in the application, whether or not they looked at the material, and they did not look at the material, and I find there was no need for them to look at the materials were sufficient to establish trustworthiness to justify the commissioner's action in issuing the warrant and believing that a crime had been committed.

Finally, the issue has been raised as to entrapment, and that was enunciated in Simmons versus State 8 Md. App. 355. The test of entrapment as argued is certainly accurate. And that is, two questions of fact arise. One, did the agent induce the accused to commit the offense charged in the charging

document, and two, if so, was the accused ready, willing and able without persuasion and was he awaiting an opportunity to commit the offense? But the problem is not the test, but when should we apply the test? And the Court in Simmons sets down procedural guidelines and at Page 364 they tell us a motion to dismiss the indictment or suppress the evidence does not lie.

I believe that I have covered all of the issues and I believe that my ruling was clear.

Just to restate it, the motion to dismiss for the reasons given is denied.

The motion for suppression for reasons given is denied and this is applicable to all the cases that are now before the court.